

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

SHANE A. COSTA,)	
)	
Plaintiff,)	
)	No. CV-09-6048-HU
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	OPINION & ORDER
Security,)	
)	
Defendant.)	
)	

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/ / /

1 - OPINION & ORDER

1 Kathryn A. Miller
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5 HUBEL, Magistrate Judge:

6 Plaintiff Shane Costa brought this action for judicial review
7 of the Commissioner's final decision to deny Supplemental Security
8 Income (SSI). Both parties have consented to entry of final
9 judgment by a Magistrate Judge in accordance with Federal Rule of
10 Civil Procedure 73 and 28 U.S.C. § 636(c). On September 30, 2010,
11 this Court issued a Judgment reversing the Commissioner's decision
12 and remanding for additional proceedings.

13 Plaintiff now seeks \$10,554.72 in attorney's fees pursuant to
14 the Equal Access to Judgment Act, 28 U.S.C. § 2412 (EAJA).
15 Defendant objects to the number of hours plaintiff's counsel
16 expended on the case. I grant the motion in part and deny it in
17 part.

18 EAJA requires an award of attorney's fees to prevailing
19 parties in civil actions against the United States unless the
20 position of the United States was substantially justified. 28
21 U.S.C. § 2412(d)(1)(A). Defendant does not dispute that plaintiff
22 was the prevailing party. Defendant also concedes that procedural
23 errors by the Administrative Law Judge rendered the government's
24 position not substantially justified.

25 The court exercises discretion in awarding fees under EAJA.
26 See Rodriguez v. United States, 542 F.3d 704, 709 (9th Cir. 2008)
27 (court of appeals reviews district court award of fees under EAJA
28

1 for abuse of discretion); see also Webb v. Ada County, 195 F.3d
2 524, 527 (9th Cir. 1999) (district court possesses "considerable
3 discretion" in determining the reasonableness of a fee award). The
4 fee award is a combination of the number of hours reasonably
5 worked, multiplied by a reasonable hourly rate.

6 Plaintiff seeks \$10,544.72 in fees, based on a total of 60.5
7 hours. The actual billing entries are reflected in Exhibit A to
8 Plaintiff's Memorandum in Support of EAJA Fees. Defendant objects
9 to the overall number of hours as excessive, as well as time spent
10 on any clerical tasks.

11 As Judge Mosman noted in a 2007 opinion, "[t]here is some
12 consensus among the district courts that 20-40 hours is a
13 reasonable amount of time to spend on a social security case that
14 does not present particular difficulty." Harden v. Commissioner,
15 497 F. Supp. 2d 1214, 1215 (D. Or. 2007) (citing cases). Judge
16 Mosman agreed that absent unusual circumstances or complexity,
17 "this range provides an accurate framework for measuring whether
18 the amount of time counsel spent is reasonable." Id. at 1216.

19 I agree with defendant that several billing entries reflect
20 time spent on clerical tasks which should not be billed at attorney
21 rates and which should not be compensable as EAJA attorney fees.
22 Missouri v. Jenkins, 491 U.S. 274, 288 n.10 (1989) ("purely
23 clerical or secretarial tasks should not be billed at a paralegal
24 [or lawyer] rate, regardless of who performs them. . . . [The]
25 dollar value [of non-legal clerical work] is not enhanced just
26 because a lawyer does it."); Gough v. Apfel, 133 F. Supp. 2d 878,
27 881 (W.D. Va. 2001) ("[p]urely clerical activities, regardless of
28 who performs them, are considered overhead and are not compensable

1 as EAJA attorney fees.").

2 The following billing entries are not subject to payment as
3 EAJA attorney's fees:

4 0.1 hours on March 11, 2009, for downloading an ECF notice;

5 0.1 hours on April 14, 2009, for downloading an ECF notice;

6 0.1 hours on July 14, 2009, for downloading an ECF notice;

7 0.1 hours on March 19, 2010, for downloading defendant's
8 extension filings;

9 0.1 hours on March 23, 2010, for downloading a court order;

10 0.1 hours on April 26, 2010, for downloading a court order;

11 0.2 hours on May 10, 2010, for downloading and docketing court
12 orders;

13 0.1 hours on June 9, 2010, for downloading and docketing a
14 court order; and

15 0.1 hours on September 30, 2010, for downloading and docketing
16 the Judgment.

17 There are other clerical billing entries, but they are listed
18 as one of several tasks in a single billing entry, making it
19 impossible to tell from the billing entry alone how much time was
20 spent on the clerical task. Because each of the clerical tasks
21 above was billed at 0.1 hours, I subtract that amount from the
22 total billed of the following entries:

23 0.1 is subtracted from the 0.4 hours billed on September 24,
24 2009, for docketing the transcript;

25 0.1 is subtracted from 0.7 hours billed on April 22, 2010, for
26 downloading defendant's extension filings;

27 0.1 is subtracted from the 0.5 hours billed on May 5, 2010,
28 for filing a motion;

1 0.1 is subtracted from the 0.4 hours billed on June 8, 2010,
2 for downloading defendant's memorandum;

3 0.1 is subtracted from the 0.3 hours billed on September 9,
4 2010, for attempting to download defendant's response memorandum;
5 and

6 0.1 is subtracted from the 0.8 hours billed on September 30,
7 2010, for downloading the Court's opinion.¹

8 The billing entries reveal that plaintiff's counsel spent 25
9 hours preparing the opening memorandum. This is in addition to 4.2
10 hours spent reviewing the transcript, and another 0.6 hours spent
11 outlining the ALJ's decision. While the total time spent on
12 briefing in this case may be more than usual because of a
13 supplemental filing necessitated by a missing part of the
14 transcript, the opening memorandum was only seventeen pages long,
15 fairly short by comparison to many social security opening
16 memoranda. Moreover, the issues in the case were not novel or
17 unusually complex. 25 hours is unreasonable. I award 12 hours for
18 time spent on the opening memorandum.

19 Additionally, the time spent on plaintiff's supplemental and
20 reply memoranda are also excessive. Plaintiff's supplemental
21 memorandum was just over six pages, with only one-half of one page
22 devoted to argument. The remaining pages were a recitation of the
23 information contained in the previously missing, but later

24
25 ¹ Additionally, while 0.1 of the 0.7 hours billed on
26 January 19, 2010, for, inter alia, filing the opening memorandum,
27 should be subtracted because filing the document is a clerical
28 task, I do not separately subtract it here because, as discussed
below, I subtract many of the total hours spent on the opening
memorandum and the time is subtracted below.

1 supplied, supplemental transcript. Still, plaintiff spent 3.4
2 hours on July 5, 2010, reviewing the file and prior memoranda, and
3 summarizing the supplemental transcript, and an additional 1.7
4 hours preparing the supplemental memorandum. No more than 3.5
5 hours was required for summarizing the supplemental transcript and
6 preparing the supplemental memorandum.

7 On September 27, 2010, plaintiff's counsel billed 3.1 hours
8 for reviewing the file, researching, outlining defendant's
9 memorandum, and preparing arguments. The next day, counsel billed
10 2.5 hours for writing a reply memorandum which was under four pages
11 and generally reiterated arguments previously raised. This totals
12 5.6 hours to prepare the reply memorandum. Previously,
13 plaintiff's counsel spent 0.3 hours reviewing defendant's
14 memorandum when it was filed in June 2010², another 0.1 hours
15 discussing it with co-counsel at that point, and some unspecified
16 amount of the 3.4 hours billed on July 5, 2010 reviewing memoranda.

17 Additionally, plaintiff's counsel spent 0.2 hours on September
18 9, 2010, reviewing defendant's response to plaintiff's supplemental
19 memorandum, but defendant's response consisted of two sentences
20 stating that because plaintiff's supplemental brief contained no
21 new or additional arguments, defendant had no additional response.
22 No more than 0.1 hours was required for this task.

23 Given the time plaintiff's counsel had already expended on
24 reviewing defendant's response filed in June 2010, as well as the
25

26 ² Plaintiff's counsel billed 0.4 hours on June 8, 2010, to
27 download and review defendant's memorandum. I subtracted 0.1 of
28 that time because the downloading is a clerical function, leaving
0.3 hours as the time spent reviewing the memorandum.

1 time spent reviewing defendant's response to plaintiff's
2 supplemental memorandum on September 9, 2010, the 5.6 hours spent
3 on the tasks involved in preparing the reply memorandum on
4 September 27 and 28, 2010, is excessive. I award 2.5 hours for
5 that time.

6 Finally, defendant complains that the 2.3 hours preparing EAJA
7 documents were clerical in nature and should not be reimbursed.
8 The time sought is 1.3 hours for preparing a time sheet as well
9 emailing and phoning lead co-counsel, and an additional 1.0 hours
10 for completing the "accounting for EAJA." Exh. A to Pltff's Mem.
11 The billing entries do not, by themselves, suggest that the nature
12 of this work was purely clerical in nature. It is not unreasonable
13 for the attorney him- or herself to prepare the time sheet for
14 submission in support of a fee application. Nor is 1.0 hours
15 unreasonable for completing the accounting. I note that there is
16 no separate request for preparing or filing the motion and
17 memorandum. I do not consider a total of 2.3 hours to be excessive
18 for the preparation of the motion, the memorandum, and the
19 supporting materials.

20 Of the 60.5 hours requested in the EAJA fee petition, I
21 subtract 19.4 hours, leaving a total of 41.1. As noted above, a
22 portion of the original transcript was missing from the transcript
23 initially filed, requiring plaintiff to discuss the issue with
24 opposing counsel, confer regarding a motion to extend defendant's
25 time to respond to plaintiff's opening memorandum in order to
26 acquire the missing transcript, consult with the Court regarding
27 scheduling of supplemental briefing, reviewing the supplemental
28 transcript, and submitting a supplemental memorandum. Thus, while

1 the total number of allowed hours is at the high end of the range
2 identified by Judge Mosman, it is not unreasonable in this case.

3 EAJA sets a ceiling of \$125 per hour "unless the court
4 determines that an increase in the cost of living . . . justifies
5 a higher fee." 28 U.S.C. § 2412(d)(2)(A). To adjust for the cost
6 of living, the Ninth Circuit applies the consumer price index for
7 all urban consumers (CPI-U). Jones v. Espy, 10 F.3d 690, 692-93
8 (9th Cir. 1993) (CPI-U for all items, not just legal services,
9 applies). According to the time sheet submitted by plaintiff, the
10 allowable time was billed in three different years as follows: (1)
11 2008 - 0.2 hours; (2) 2009 - 8.2 hours; (3) 2010 - 32.7 hours, for
12 a total of 41.1 hours.

13 The CPI-U for 2008 is 215.303 (table available at
14 <http://www.bls.gov/cpi/#tables>). The adjusted hourly rate for 2008
15 is \$172.85. See Ramon-Sepulveda v. INS, 863 F.2d 1458, 1463 n.4
16 (9th Cir. 1988) (explaining formula as EAJA ceiling (presently
17 \$125/hour), x the CPI-U for current month/CPI-U for month Congress
18 adopted current ceiling. 155.7 is the CPI-U for March 1996, the
19 month Congress adopted the \$125/hour rate). The CPI-U for 2009 is
20 214.537. The adjusted hourly rate for 2009 is \$172.24. The CPI-U
21 for November 2010 (the most recent month for which information is
22 available) is 218.803 (table available at
23 <http://www.bls.gov/news.release/cpi.t03.htm>). The adjusted hourly
24 rate for 2010 is \$175.67.

25 Computing the annual hours by the adjusted annual rate shows
26 the following allowable fees: \$34.57 for 2008, \$1,412.37 for 2009,
27 and \$5,744.41 for 2010, for a total of \$7,191.35.

28 / / /

CONCLUSION

Plaintiff's motion for EAJA attorney's fees is granted in part and denied in part. Plaintiff is awarded \$7,191.35. Consistent with Astrue v. Ratliff, 130 S. Ct. 2521, 2527-28 (2010), this EAJA award is subject to any offset allowed under the Treasury Offset Program.

IT IS SO ORDERED.

Dated this 18th day of January, 2011.

/s/ Dennis J. Hubel

Dennis James Hubel
United States Magistrate Judge